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No. 99-1908

IN THE SUPREME COURT OF THE UNITED STATES

NOV 9 2000

JAMES ALEXANDER, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ALABAMA DEPT. OF PUBLIC SAFETY

AND

ALABAMA DEPT. OF PUBLIC SAFETY,

Petitioners

v.

MARTHA SANDOVAL,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PRO-ENGLISH, ENGLISH FIRST FOUNDATION, CENTER FOR AMERICAN UNITY, AND UNITED STATES REPRESENTATIVES TOM TANCREDO, SPENCER BACHUS, BOB BARR, JOHN DOOLITTLE, BOB GOODLATTE, ERNEST ISTOOK, JOE KNOLLENBERG, WILLIAM LIPINSKI, CHARLIE NORWOOD, RON PAUL, BOB RILEY, DANA ROHRABACHER, NICK SMITH AND BOB STUMP AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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November 9, 2000

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QUESTIONS PRESENTED

Whether Congress intended to create a private cause of action in federal court against a State agency that receives federal grant funds, thereby allowing a private individual to enforce disparate effect regulations promulgated by federal agencies under Section 602 of the Civil Rights Act of 1964 and bypass the federal agency review and enforcement process established by Congress.

Note: *Amici* respectfully suggest that the Question presented above fairly includes the following questions:

Whether a person's choice of language can be equated, under Title VI of the Civil Rights Act of 1964, to the person's national origin.

Whether Title VI of the Civil Rights Act of 1964 requires a state agency, which receives federal funds for some of its programs, to provide all services in any language demanded by applicants.

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INTEREST OF AMICI CURIAE

There are several amici curiae participating in this brief.[1] Counsel for all parties have consented to the filing of this brief.

Pro-English (formerly known as English Language Advocates) is a non-profit advocacy organization dedicated to the preservation and promotion of a common language – English – in American political and governmental life. Pro-English is an unincorporated project of U.S., Inc., of Petoskey, Michigan, a non-profit charitable and educational corporation. Pro-English and its President, Robert D. Park, have been the principal advocates for "official English" policies before the federal courts, including in *Arizonans for Official English and Robert D. Park v. Arizona*, Nos. 95-974 and 98-167.

English First Foundation ("EFF") is a national, non-profit charitable organization which studies the significance of the use of English in the United States and educates the public about the importance of preserving English as the common language of the United States. EFF conducts research, educational programs, seminars and conferences, and provides legal counseling and assistance. EFF was an *amicus curiae* in Nos. 98-404 and 98-564, *U.S. Dept. of Commerce v. U.S. House of Representatives*, and *Clinton v. Glavin*.

The Center for American Unity ("CAU") is a national non-profit charitable and educational organization dedicated to preserving our historical unity as Americans into the 21st Century. CAU's education program emphasizes that America's common language, English, is the basic bond uniting and strengthening the United States.

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[1]Pursuant to Rule 37.6, *amici* certify that no other person or entity made a monetary contribution to the preparation and submission of this brief, and that no counsel to a party authored this brief in whole or in part.

Cong. Tom Tancredo, a United States Representative from the Sixth District of Colorado, sits on the Subcommittee on Oversight and Investigations of the House Committee on Education and Labor, which has jurisdiction over the Equal Employment Opportunity Commission, discussed at length herein. Cong. Tancredo sent and received the letters reprinted in the Appendix to this brief.

Cong. Spencer Bachus, Bob Barr, John Doolittle, Bob Goodlatte, Ernest Istook, Joe Knollenberg, William Lipinski, Charlie Norwood, Ron Paul, Bob Riley, Dana Rohrabacher, Nick Smith, and Bob Stump are United States Representatives from Alabama, Georgia, California, Virginia, Oklahoma, Michigan, Illinois, Georgia, Texas, Alabama, California, Michigan, and Arizona, respectively.

At its heart, this case is about whether a person's choice of language can be equated to the person's national origin. *Amici* are deeply concerned about the effect of equating language and national origin. *Amici* are involved in efforts to promote the use of English as the language of government, and *amici* believe that equating language and national origin will both stop governments from requiring the use of English and force governments to provide services in languages other than English. Such an equation of language and national origin could have a substantial impact on *amici*'s activities.

STATEMENT OF CONTEXT

This is the third time in the last ten years that this Court has reviewed cases involving government's choice of language for internal operations: *Hernandez v. New York*, 500 U.S. 352

(1991), No. 89-7645; *Arizonans for Official English v. Arizona*, 520 U.S. 34 (1997), No. 95-974; and this case.[2]

This Court last looked at language-related issues in *AOE v. Arizona*, No. 95-974. At that time, the briefs of the parties and *amici* described current political battles on the federal level, including Congressional considerations of legislation to declare English the official language of the United States, to reform bilingual ballots and to eliminate bilingual education. In the intervening years, there has been relatively little Congressional activity on language-related questions, but enormous changes

[2]This Court earlier vacated a case which offered an unacceptable "solution" to tensions in the workplace caused by the use of languages other than English. In *Gutierrez v. Municipal Court of the Southeast Judicial District*, 838 F.2d 1031, 1039 (9th Cir. 1988), *dissent from reh'g en banc*, 861 F.2d 1187 (9th Cir. 1988), *vacated*, 490 U.S. 1016 (1989), Judge Reinhardt said, in part, that problems associated with African-American supervisors not understanding Spanish-speaking workers could be remedied by hiring bilingual supervisors. 838 F.2d at 1043. Judge Kozinski and two other judges called the proposal to fire African-American supervisors a "let them eat cake" attitude which would exacerbate racial tensions in the workplace. 861 F.2d 1187, 1194 (9th Cir. 1988)(Kozinski, J., dissenting from denial of reh'g *en banc*). Judge Kozinski's prediction may be on target. *See, e.g., Family Service Agency San Francisco v. Nat'l Labor Relations Board*, 163 F.3d 1369 (9th Cir. 1999)(discussing language tensions in a racially-diverse workplace).

Though this Court vacated *Gutierrez*, Judge Reinhardt considers the vacated opinion to still "represent the thinking" of the Ninth Circuit. *Garcia v. Spun Steak*, 13 F.3d 296, 301 (9th Cir. 1994)(Reinhardt, J., dissenting from denial of reh'g *en banc*). So do Respondents, Pet. App. 238a (District Court quoting plaintiffs), and the Equal Employment Opportunity Commission. Amici App. 19A, n. 5 ("the validity of the case's reasoning was not affected because it was vacated on the ground of mootness.").

have occurred elsewhere, especially in the area of bilingual education.

In 1998, for example, California voters overwhelmingly adopted Proposition 227, an initiative driven by parents of limited-English proficiency ("LEP") children who wanted their kids to learn English. Steinberg, "Increase in Test Scores Counters Dire Forecasts for Bilingual Ban," *The New York Times*, August 20, 2000, P. A1. The initiative, known as "English for the Children," eliminated most existing bilingual education programs, which taught children in their native languages ("native language instruction"). The English for the Children initiative substituted an intensive program of English language instruction, teaching the children English by teaching them in English. *Id.*

Two school years later, test scores indicate that teaching the children in English was a smashing success.[3] Test scores in most school districts jumped dramatically. *Id.*

> In second grade, for example, the average score in reading of a student classified as limited in English increased 9 percentage points over the last two years, to the 28th percentile from the 19th percentile in national rankings, according to the state. In mathematics, the increase in the average score for the same students was 14 points, to the 41st percentile from the 27th.

Id.

One of the principal backers of the prior method of "native language instruction" was Oceanside, Calif., Superintendent of Schools Ken Noonan, a founder of the

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[3]*See, also,* Pearce & Ryman, "English-only Receives Boost," *Arizona Republic*, Aug. 22, 2000, front page.

California Association of Bilingual Education. Noonan, "I Believed That Bilingual Education Was Best . . Until the Kids Proved Me Wrong," *The Washington Post*, September 3, 2000, B1. Noonan fought Proposal 227, but when the voters passed it, he led Oceanside School District into strict compliance with the new law's requirements. *Id.* The results: Oceanside's test scores improved by 19 percentage points since implementation of the new law. *Id.*

> "I thought it would hurt kids," Mr. Noonan said of the ballot initiative, which was called Proposition 227. "The exact reverse occurred, totally unexpected by me. The kids began to learn – not pick up but learn – formal English, oral and written, far more quickly than I ever thought they would."

Steinberg, *supra.*

And the increase can be attributed to the new English immersion form of education:

> Oceanside's performance was all the more striking when measured against the nearby district of Vista, where half the limited English speakers . . . continued in bilingual classes. In nearly every grade, the increases in Oceanside were at least double those in Vista, which is similar in size and economic background to Oceanside.

Id.

The success of California's elimination of bilingual education is spurring similar efforts in Arizona, Colorado, Massachusetts, New York and other states. *Id.* In Connecticut, a new law offers English instruction and parental choice opportunities similar to those in the California initiative. Pub. Act 99-121, "An Act Improving Bilingual Education,"

http://www.cga.state.ct.us/ps99/act/pa/1999pa-00211-r00sb-01083-pa.htm.

At the same time, however, federal agencies are mounting an aggressive attack on English-language policies and programs. After hearing about the Oceanside School District's success, the federal Department of Education challenged Oceanside's implementation of the new English-language instructional techniques. Diehl, "O'side district ripped over bilingual ed," *North County Times*, Oct. 3, 2000, front page, *reprinted at* http://www.onenation.org/0010/100300b.html (reporting on joint investigation between federal and state departments of education); Diehl, "Prop. 227 author criticizes investigation of O'side district," *North County Times*, October 4, 2000, *reprinted at* http://www.onenation.org/0010/100400c.html ("The district could not document that they follow their own policies and procedures").

Similarly, the Equal Employment Opportunity Commission is steadily increasing its attacks on employers who wish their employees to speak English on the job. The EEOC has promulgated a rule which presumes that an employer's rule requiring English in the workplace is national origin discrimination. 29 C.F.R. § 1606.7. The EEOC reports that in 1996, it reviewed 77 national-origin discrimination challenges to workplace language rules. U.S. Equal Employment Opportunity Commission, "Court Speaks: English Only Rule Unlawful," Press Release, Sept. 19, 2000, www.eeoc.gov/press/9-19-99.html. That number jumped to 253 in 1999, and 355 by September of this year. *Id.*

As shown in more detail below, virtually every federal court which has considered the issue has rejected the EEOC's interpretation. For example, the Ninth Circuit recently rejected the EEOC policy as *ultra vires*. *Garcia v. Spun Steak*, 998 F.2d 1480, 1489-90 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228

(1994)(upholding English-language workplace rule to stop workers from hurling racial insults at co-workers).

Yet a recent exchange of letters with Amicus Cong. Tom Tancredo, *attached* as an Appendix ("Amici App."), indicates that the EEOC is continuing to enforce its policy, even in jurisdictions which have rejected its interpretation.

Two dozen charges were resolved between August 1998 and August 1999. Amici App. 22A - 24A. Some of the charges were filed in appellate circuits which had rejected the guidelines. Amici App. 23A. The EEOC explains: "EEOC offices in a jurisdiction that has issued a decision contrary to the guidelines continue to conduct the administrative process pursuant to the guidelines. . . . Of course the EEOC would not file a suit to enforce the guidelines if such suit has been precluded by governing circuit law." Amici App. 23A - 24A. .

Building on the decision below and on the EEOC's new enforcement effort, the Administration issued Executive Order No. 13,166 (Aug. 11, 2000).[4] Executive Order 13,166 makes the same equation of language and national origin that the lower court did in this case. Executive Order 13,166 requires federal agencies to "provide meaningful access . . . to ensure that the programs and activities they normally provide in English are accessible to LEP [Limited English Proficient] persons and **thus do not discriminate on the basis of national origin**." Supp. App. 11a, (emphasis added).

Executive Order 13,166 requires federal agency programs to be approved under and be subject to the Department of Justice's new Policy Guidance on assistance to

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[4]Executive Order 13,166 and the interlocked Department of Justice Policy Guidelines were submitted as a supplemental filing to the Petition and are reprinted in the appendix thereto. Appendix to Supplemental Filing ("Supp. App.").

LEP persons. Supp. App. 12a. The Justice Department's Policy Guidance similarly equates language and national origin, relying in part on the decision below. Supp. App. 19a, 21a. The Policy Guidance expands this equation to federal grantees. "Recipients who fail to provide services to LEP applicants and beneficiaries in their federally assisted programs and activities may be discriminating on the basis of national origin in violation of Title VI and its implementing regulations." Supp. App. 23a. In addition, because of the use of Title VI definitions of national origin in Title VII and IX cases, this equation of language and national origin will be applied in private employment cases, and perhaps other areas as well.[5]

Under Executive Order 13,166 and the Justice Department Policy Guidance, it is not enough to be neutral about language. To avoid a charge of national origin discrimination, an agency, grantee or employer must affirmatively provide language assistance. Supp. App. 23a - 27a.

Though the extent of assistance is supposed to be determined by a variety of factors, at a minimum, the agency, grantee or employer must provide at least oral translation services if only one person requests it. Supp. App. 23a. The Policy Guidance requires, in most cases, at least the use of "one of the commercially available language lines to obtain immediate interpreter services." Supp. App. 24a. Though not stated, apparently the cost of such services, which can be as high as $4.50 per minute plus "set-up" fees,[6] is to be borne by the agency, grantee or employer subject to a potential charge of national origin discrimination.

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[5]The lower court recognized the adoption of Title VII case law in its Title VI jurisprudence. Pet. App. 56a, n. 27.

[6]At, for example, AT&T LanguageLine Services. www.languageline.com/products_personal.php3.

Thus, at the same time that States are actively using more effective means to bring persons who do not speak English into the educational and social mainstream, the Executive Branch is using the decision below to impair just those successful efforts. The Executive Branch, without any authorization by Congress or the courts, has equated language and national origin in a manner which will cause enormous amounts of litigation, and will stifle promising efforts to teach English to those who could benefit so much.

SUMMARY OF ARGUMENT

The crux of this dispute is the equation of a person's choice of language to the person's national origin. To have a private right of action, as asserted here, a claimant must come within one of the recognized Title VI classes; the class at issue in this case is "national origin." Here no particular language was singled out as a proxy for discrimination against a protected class, thus the question is whether a choice of using English (as opposed to choosing to use languages other than English) is national origin discrimination.

The answer must be no. Equating a person's language with the person's national origin has no basis in law or fact. There is no statutory language or legislative history in the civil rights laws which suggests such an equation.

Nor is there any judicial decision which finds such an equation in the civil rights laws. Though there have been some suggestions that language rules may be proxies for otherwise hidden national origin discrimination, the vast majority of decisions have rejected the equation of language and national origin without more.

There are some administrative interpretations which equate language choice to national origin. These interpretations,

however, do not bind this Court. In addition, courts have overwhelmingly rejected those interpretations.

The equation of language to national origin also has no basis in fact, and would be both over- and under-inclusive. Spanish, for example, is the official language of at least 13 countries, impairing a determination of a speaker's ancestry. Many Hispanic-Americans do not speak Spanish, and many non-Hispanic-Americans do.

In addition, equating language and national origin would be unworkable. This is not a case about English vs. Spanish, but about English vs. hundreds of languages. The courts have repeatedly recognized the tremendous burdens of translating hundreds of languages and refused to impose such burdens.

Finally, equating language and national origin would be unwise. Any recognition by the Court of such an equation would affect dozens of settled decisions, sparking an enormous number of new claims of discrimination in government, contracting, employment, housing and other areas.

Any such equation of language and national origin would affect "original power" core functions of States. Choice of language for internal functions has historically been left to the States. Federal intervention on language choice over a vast sweep of State programs will weaken the States' powers. The statutory or constitutional authority for any such intervention should be explicit. Absent a clear and explicit abrogation of those State powers, the States should be left to decide – through their own political processes – which language burdens to accept. There is no such clear and explicit abrogation of State power for the language choices in this case.

The decision below should be reversed.

ARGUMENT

I. A Per Se *Rule Equating Language With National Origin Has No Basis in Law or Fact, and Would Be Unworkable and Unwise.*

The decision below equates language and national origin. *Sandoval v. Hagan*, 197 F.3d 484, 508-09 (11th Cir. 1999); *see*, Pet. App. 22a-29a.[7] Such a novel *per se* equation of language choice and national origin has no basis in law or fact, and would be unworkable and unwise.

A. A *Per Se* Rule Equating Language and National Origin Has No Basis In Law or Fact.

1. A Per Se *Rule Equating Language and National Origin Has No Basis in Law.*

The language, history and interpretations of the Fourteenth Amendment and other federal laws do not support equating, *per se*, language and national origin.

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[7]The Eleventh Circuit's analysis on this question was suspect. *Compare*, Pet App. 52a, "While existent case law is **unclear** as to whether language may serve as a proxy for *intentional* national origin discrimination claims of either a constitutional or statutory nature, this question is tangential to disparate *impact* analysis." (boldface added, italics in original), with *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984):

> A classification is implicitly made, but it is on the basis of language, *i.e.*, English-speaking versus non-English-speaking individuals, and not on the basis of race, religion or national origin. Language, by itself, does not identify members of a suspect class.

See also, Toure v. United States, 24 F.3d 444, 446 (2d Cir. 1994)(affirming "the broadly-stated and thoroughly sensible ruling in *Soberal-Perez*").

Statutory Language:

"[T]he reach of Title VI's protection extends no further than the Fourteenth Amendment." *United States v. Fordice*, 505 U.S. 717, 732 n. 7 (1992)(citations omitted). The Fourteenth Amendment does not include the phrase "national origin." Nevertheless, discrimination on the basis of ancestry violates the Equal Protection Clause of the Fourteenth Amendment. *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 614 n. 5 (1987). "Distinctions between citizens solely because of their ancestry are by their very nature odious to free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

No federal statute defines "national origin." Title VI of the Civil Rights Act of 1964 added "national origin," without definition, to the list of protected classes. 42 U.S.C. § 2000d, Pub. L. 88-352, Title VI, § 601, July 2, 1964, 78 Stat. 252.

Legislative History:

Legislative history does not support a language-based definition of national origin. This Court has noted that the legislative history concerning the meaning of national origin, even under statutory law, is "quite meager." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973). Nevertheless, "[t]he terms 'national origin' and 'ancestry' were considered synonymous." 414 U.S. at 89. During debate on the 1964 Civil Rights Act, Representative Roosevelt stated: "May I just make very clear that 'national origin' means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country." 110 CONG. REC. 2,549 (1964).

This Court supports that assessment: "[t]he term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her

ancestors came." *Espinoza*, 414 U.S. at 88; *see also, Pejic v. Hughes Helicopters*, 840 F.2d 667, 672-73 (9th Cir. 1988)(persons of Serbian national origin are members of a protected class under Title VII).

Administrative Interpretations:

As noted above, there are now three administrative interpretations which equate language and national origin. The oldest[8] is the EEOC's presumption against requiring the use of English on the job. 29 C.F.R. § 1606.7. The newest are the interlocked Executive Order 13,166 (August 11, 2000) (*reprinted* in Supp. App. 10a - 13a), and the Justice Department's Policy Guidance on National Origin Discrimination Against Persons With Limited English Proficiency (*reprinted* in Supp. App. 14a - 28a).

This Court has never reviewed those administrative interpretations, and they do not bind this Court. *Espinoza*, 414 U.S. at 94-95.

Numerous other courts have reviewed the EEOC Guidelines and have rejected them and their underlying equation of language and national origin. *See, e.g., Garcia v. Spun-Steak*, 998 F.2d 1480, 1489-90 (9th Cir. 1993), *cert. den.* 512 U.S. 1228 (1994)(EEOC Guidelines equating language and

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[8]The EEOC presented its proposed interpretive guidelines to the Fifth Circuit (prior to the creation of the 11th Circuit), but the Fifth Circuit rejected the interpretation in *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981)("The EEO Act does not support an interpretation that equates the language an employee prefers to use with his national origin."). Cong. Tancredo's examination of the legal support for this interpretation and the EEOC's detailed response (which relies on Judge Reinhardt's vacated opinion in *Gutierrez v. Municipal Court of the Southeast Judicial Dist.*, discussed in fn 2 above) are attached as the Appendix to this brief.

national origin were *ultra vires*); *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981)(upholding English-on-the-job rule for non-English-speaking truck drivers); *Garcia v. Rush-Presbyterian St. Luke's Medical Center*, 660 F.2d 1217, 1222 (7th Cir. 1981)(upholding hiring practices requiring English proficiency); *Long v. First Union Corp.*, 894 F.Supp. 933, 941 (E.D. Virginia, 1995 ("there is nothing in Title VII which protects or provides that an employee has a right to speak his or her native tongue while on the job."), *affirmed*, 86 F.3d 1151 (4th Cir. 1996).

Judicial Interpretations:

As the lower court recognized, 197 F.3d at 509 n. 26, this Court has never held that the language a person chooses to speak can be equated to the person's national origin.[9] Though this issue was briefed and discussed in *Hernandez v. New York*, 500 U.S. 352 (1991), the Court did not make a holding on this question. "Petitioner argues that Spanish-language ability bears a close relation to ethnicity, and that, as a result, it violates the Equal Protection Clause. . . We need not address that argument here." 500 U.S. at 360.

The Circuits, on the other hand, have rejected such an equation.[10] *See, e.g., Soberal-Perez v. Heckler*, 717 F.2d at 41:

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[9]*Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926), sometimes cited to equate language and national origin, involved intentional discrimination on the basis of ancestry rather than language, because the law there was designed "to affect [Chinese merchants] as distinguished from the rest of the community." 271 U.S. at 528.

[10]The circuit courts have found a Sixth Amendment right to an interpreter at criminal trials. *See, e.g., United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970). *But see, Abdullah v.*

(continued...)

> A classification is implicitly made, but it is on the basis of language, *i.e.*, English-speaking versus non-English-speaking individuals, and not on the basis of race, religion or national origin. Language, by itself, does not identify members of a suspect class.

See, also, Toure v. United States, 24 F.3d at 446 (affirming *Soberal-Perez* and rejecting request for multilingual forfeiture notices). "A policy involving an English requirement, without more, does not establish discrimination based on race or national origin." *An v. General Am. Life Ins. Co.*, 872 F.2d 426 (9th Cir. 1989)(table).

A few cases indicate that if the language policy is a pretext for intentional discrimination, a language-related rule might violate national origin rules.[11] In addition, two recent lower court decisions have adopted the EEOC's interpretation equating language and national origin. *See, e.g., EEOC v. Synchro-Start Products*, 29 F.Supp.2d 911, 915 n. 10 (N.D. Illinois, 1999)(on advice of law clerk, Judge Shadur was "staking out a legal position that has not been espoused by any appellate court."); *EEOC v. Premier Operator Services*, 113

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[10](...continued)
Immigration and Naturalization Service, 184 F.3d 158, 165-66 (2d Cir. 1999)(distinguishing between "government-initiated proceedings seeking to affect adversely a person's status and hearings arising from the person's affirmative application for a benefit").

[11]For example, Judge Reinhardt wrote, in an opinion vacated by this Court, that "since language is a close and meaningful proxy for national origin, restrictions in the use of languages may mask discrimination against specific national origin groups, or more generally, conceal nativist sentiment." *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 947-48 (9th Cir. 1995), *vacated, sub nom., Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

F.Supp.2d 1066 (N.D. Texas, 2000)(Magistrate Judge Stickney, rejecting appellate cases against EEOC Guidelines and relying on *Synchro-Start Products* and Judge Reinhardt's dissent from denial of rehearing *en banc* in *Spun Steak*, found disparate treatment of Hispanic employees in the promulgation of an English-workplace rule).

But almost all cases, including all Circuit decisions, have rejected the equation of language and national origin. *See, e.g., Gloor*, 618 F.2d at 270 ("The EEO Act does not support an interpretation that equates the language an employee prefers to use with his national origin."); *Nazarova v. INS*, 171 F.3d 478, 483 (7th Cir. 1999)(permitting deportation notices in English); *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973)(permitting English benefit termination notices); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975)(civil service exam for carpenters can be in English); *Garcia v. Spun Steak*, 998 F.2d 1480, 1489-90 (9th Cir. 1993), *cert. den.*, 512 U.S. 1228 (1994) (rejecting EEOC guidelines); *Gonzalez v. Salvation Army*, 985 F.2d 578 (11th Cir.)(table), *cert. den.*, 508 U.S. 910 (1993)(rejecting employment discrimination claim); *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987)(permitting radio station to choose language an announcer would use); *Vasquez v. McAllen Bag & Supply Co.*, 660 F.2d 686 (5th Cir. 1981) (upholding English-on-the-job rule for non-English-speaking truck drivers); *Garcia v. Rush-Presbyterian St. Luke's Medical Center*, 660 F.2d 1217 (7th Cir. 1981)(upholding hiring practices requiring English proficiency); *Long v. First Union Corp.*, 894 F.Supp. 933, 941 (E.D. Virginia, 1995)("there is nothing in Title VII which protects or provides that an employee has a right to speak his or her native tongue while on the job"), *affirmed*, 86 F.3d 1151 (4th Cir. 1996); *Gotfryd v. Book Covers, Inc.*, 1999 WL 20925, *8 (N.D. Ill. 1999)(rejecting attempt to use EEOC guidelines to establish hostile workplace); *Magana v. Tarrant/Dallas*

Printing, Inc., 1998 WL 548686, *5 (N.D. Texas, 1998) ("English-only policies are not of themselves indicative of national origin discrimination in violation of Title VII"); *Tran v. Standard Motor Products, Inc.*, 10 F.Supp.2d 1199, 1210 (D. Kansas, 1998)("the purported English-only policy does not constitute a hostile work environment"); *Mejia v. New York Sheraton Hotel*, 459 F.Supp. 375, 377 (S.D.N.Y. 1978)(chambermaid properly denied a promotion because of her "inability to articulate clearly or coherently and to make herself adequately understood in . . . English"); *Prado v. L. Luria & Son, Inc.*, 975 F.Supp. 1349 (S.D. Fla 1997)(rejecting challenge to English workplace policy); *Kania v. Archdiocese of Philadelphia*, 14 F.Supp. 2d 730, 733 (E.D. Penn. 1998) (surveying cases: "all of these courts have agreed that – particularly as applied to multi-lingual employees – an English-only rule does not have a disparate impact on the basis of national origin, and does not violate Title VII.").

There is, therefore, no basis in the terms, history or interpretation of "national origin" which supports a *per se* rule equating a person's language and that person's national origin.

2. A Per Se *Rule Equating Language and National Origin Has No Basis in Fact.*

Spanish is spoken in many countries,[12] impairing a determination that the language itself determines, under *Espinoza*, "the country from which his or her ancestors came." 414 U.S. at 88. Thus Hispanics are usually within a protected class not by virtue of language spoken, but by ancestry.

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[12]At least 13 countries have Spanish as their official or national language. A. Blaustein & D. Epstein, *Resolving Language Conflicts: A Study of the World's Constitutions*, (1986).

Hernandez v. Texas, 347 U.S. 475, 479-80 (1954)(persons of Mexican descent wrongfully excluded from jury duty).

A *per se* rule equating a person's language and national origin would be both over- and under-inclusive. Many Hispanics do not speak Spanish.[13] Many non-Hispanics speak Spanish.[14]

Nor is language an immutable characteristic, like "the country from which his or her ancestors came." *Espinoza*, 414 U.S. at 88. Although, for some people, learning a new language may be a difficult or unfinished task, *Garcia v. Gloor*, 618 F.2d at 270, in that aspect language may be much like alienage – not statutorily protected. Although alienage cannot be changed before qualification for naturalization, it can be changed eventually. *Sugarman v. Dougall*, 413 U.S. 634, 658 (1973)(Rehnquist, J., dissenting).

B. A *Per Se* Rule Equating Language and National Origin Is Unworkable

Providing services or assistance in many languages, as Executive Order 13,166 proposes for federal agencies,

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[13]The Rand Corporation reported in 1985 that by the second generation half the Hispanic immigrant children in California spoke English exclusively. Zall/Jimenez, *Official Use of English: Yes/No*, 74 A.B.A. J. 34, 35 (1988). And as the recent California school test scores described above demonstrate, language minority children can learn English quickly if not stopped by misguided government policies.

[14]The American Council of Teachers of Foreign Languages reported that 3,219,775 American high school students were taking Spanish language courses in 1994. Draper & Hicks, *Foreign Language Enrollment in Public Secondary Schools, Fall 1994*, Table 2. Contrary to popular belief, "people who got good grades in high school Spanish classes remembered much of the Spanish vocabulary up to 50 years after taking their last course." *College Classes Spur Lifelong Math Memory*, 138 Science News 375 (1990).

contractors or grantees could be costly and difficult. In the simplest example, increasing the number of languages increases the possibility of translation errors. *Hernandez v. New York*, 500 U.S. at 361, *citing, United States v. Perez*, 658 F.2d 654, 662 (9th Cir. 1981)[15]; *Seltzer v. Foley*, 502 F.Supp. 600, 603-4 (S.D.N.Y. 1980)(interpreter in magistrate's courtroom changed the motive of the accused without her knowledge). A 1985 report found that of 1,400 applicants, only 30 passed the federal certification test for Spanish language courtroom interpreters.

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[15]This Court quoted testimony from United States v. Perez, 658 F.2d 654 (CA9 1981), to illustrate the sort of problems that may arise even with an official translation:

> "DOROTHY KIM (JUROR NO. 8): Your Honor, is it proper to ask the interpreter a question? I'm uncertain about the word La Vado [sic]. You say that is a bar.
> "THE COURT: The Court cannot permit jurors to ask questions directly. If you want to phrase your question to me -
> "DOROTHY KIM: I understood it to be a restroom. I could better believe they would meet in a restroom rather than a public bar if he is undercover.
> "THE COURT: These are matters for you to consider. If you have any misunderstanding of what the witness testified to, tell the Court now what you didn't understand and we'll place the -
> "DOROTHY KIM: I understand the word La Vado [sic] - I thought it meant restroom. She translates it as bar.
> "MS. IANZITI: In the first place, the jurors are not to listen to the Spanish, but to the English. I am a certified court interpreter.
> "DOROTHY KIM: You're an idiot." Id., at 662.
>
> Upon further questioning, "the witness indicated that none of the conversations in issue occurred in the restroom." Id., at 663. The juror later explained that she had said "'it's an idiom'" rather than "'you're an idiot,'" but she was nevertheless dismissed from the jury. *Ibid.*

500 U.S. at 361, n. 3.

"Problems Cited in Greater Use of Court Interpreters," 16 CRIM. JUST. NEWSL. 13, 2 (1985).

More than 300 languages are spoken in the United States. U.S. Bureau of the Census, 1990 Table COHL 13: "Language Spoken At Home and Ability to Speak English for Persons 5 Years and Over." Many of those languages contain distinct dialects in which the same words mean different things. S. Berk-Seligson, *The Bilingual Courtroom*, 5 (1990) (citing Italian, Napolese and Sicilian as "different varieties of the same language."). Some of these dialectical differences could be legally significant, such as the Spanish word "guagua," which means "baby" in Nicaragua or Chile, but "bus" in the Dominican Republic. "The Fine Art of Interpreting in a Miami Court," *New York Times*, May 8, 1984, at A15, col. 1.

Courts are justifiably reluctant to impose those costs on governments which have not chosen to bear the burden. *See, e.g., Abdullah v. INS*, 184 F.3d at 166:

> The applicants in this case alone would require the provision of interpreters in Urdu, Hindi and Bengali. Upholding the right plaintiffs claim would no doubt require provision of interpreters in thousands of cases and in a huge range of languages. The expense and difficulty of meeting that need would be great.

See, also, Nazarova v. INS, 171 F.3d at 483:

> [T]he logical implication is that the INS must maintain a stock of forms translated into literally all the tongues of the human race, and then select the proper one for each potential deportee. No court to our knowledge has ever held that the Constitution requires the INS to undertake such a burden, and we will not be the first.

See further, Toure, 24 F.3d at 446 (providing forfeiture notices in preferred language would "impose a patently unreasonable burden"); *Vialez v. New York City Hous. Auth.*, 783 F.Supp. 109, 120-24 (S.D.N.Y. 1991) ("insurmountable and unjustified burden on the Housing Authority").

C. A *Per Se* Rule Equating Language and National Origin Is Unwise

This Court noted in *Holland v. Illinois*, that "[t]he earnestness of this Court's commitment to racial justice is not to be measured by its willingness to expand constitutional provisions designed for other purposes beyond their proper bounds." 493 U.S. 474, 488 (1990). It would be difficult to cabin the lower court's equation of language choice and national origin. The most critical example is the Administration's adoption of the lower court's opinion in Executive Order 13,166 to expand the equating of language and national origin to every federal agency, contractor and grantee.

Although the primary question in this case is the existence of a private right of action, a misinterpreted phrase in an opinion from this Court could generate unintended controversies in other areas far beyond this case:

Language of Government Activities:

24 States have declared English their official languages.[16] These declarations are the subject of substantial

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[16] **Alabama**: Ala. Const. Amend. 509 (1990); **Alaska**: Ak. Stats. § 44.12.330 (1998); **Arizona**: Ariz. Const. Art. XXVIII (1988) (negated by Arizona Supreme Court – 1999); **Arkansas**: Ark. Stat. Ann. 1-4-117 (1987); **California**: Cal. Const. Art. III, § 6 (1986); **Colorado**: Colo. Const. Art. II, § 30 (1988); **Florida**: Fla. Const. Art. II, § 9

(continued...)

litigation. *See, e.g. Arizonans for Official English*, No. 95-974, 520 U.S. 34 (1997).

Other cases, like this one, involve challenges to governments' choices of English for internal operations. The lower court's analysis, for example, would have precluded the English-language civil service examination upheld in *Frontera v. Sindell*, 522 F.2d at 1218, and the English-language deportation, forfeiture, and benefit notices upheld in *Nazarova v. INS*, 171 F.2d at 483, *Soberal-Perez v. Heckler*, 717 F.2d at 41, *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973), *Toure v. United States*, 24 F.3d at 446, *Alfonso v. Board of Review*, 89 N.J. 41, 444 A.2d 1075, *cert. denied*, 459 U.S. 806 (1982), *Guerrero v. Carleson*, 9 Cal. 3d 808, 512 P.2d 833, 109 Cal. Rptr. 201 (1973), *cert. denied*, 414 U.S. 1137 (1974), and *Commonwealth v. Olivio*, 369 Mass. 62, 337 N.E.2d 901 (1975).

Language of Education:

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[16](...continued)
(1988); **Georgia**: Ga. Code Ann. § 50-3-30 (1986); **Hawaii**: Hawaii Const. Art. XV, § 4 (1978) (Hawaiian is second language) ; **Illinois**: Ill. Rev. Stat. Ch. 1, § 3005 (1969); **Indiana**: Ind. Code Ann. § 1-2-10-1 (1984); **Kentucky**: Ky. Rev. Stat. § 2.013 (1984); **Mississippi**: Miss. Code Ann. § 3-3-31 (1987); **Missouri**: Mo. Stats. § 1-028 (1999); **Montana**: Mont. Code Ann. § 1-1-510 (1995); **Nebraska**: Neb. Const. Art. I, § 27 (1920); **New Hampshire**: 1995 N.H. Laws 157 (1995); **North Carolina**: N.C. Gen. Stat. Ch. 145, § 12 (1987); **North Dakota**: N.D. Cent. Code, § 54-02-13 (1987); **South Carolina**: S.C. Code Ann. § 1-1-(696-698) (1987); **South Dakota**: S.D. Codified Laws Ann. §§ 1-27-20 to 1-27-26 (1995); **Tennessee**: Tenn. Code Ann. § 4-1-404 (1984); **Virginia**: Va. Code § 22.1-212.1 (1950); **Wyoming**: Wyo. St. 8-6-101 (1996). An initiative measure declaring English the official language is on the November 7, 2000 Utah ballot.

As noted above, the elimination of bilingual education reform is a rapidly-growing effort, driven by parents who want their children taught English. If this Court were to equate language and national origin, the federal agencies would roll back these bilingual education reforms, crushing the hopes and dreams of these parents and condemning their children to what the *New York Times* called "a bilingual prison." "A Bilingual Prison," *The New York Times*, September 21, 1995, A22.

Language of the Workplace:

As noted above and discussed in the Appendix to this brief, courts have overwhelmingly rejected the EEOC's presumption that English-on-the-job rules are national origin discrimination. *See, e.g., Gloor*, 618 F.2d at 270 ("The EEO Act does not support an interpretation that equates the language an employee prefers to use with his national origin."); *Spun-Steak*, 998 F.2d at 1489-90 (EEOC Guidelines are *ultra vires*). These decisions would be wiped away if this Court recognizes the relationship between language and national origin posed by the decision below.

Amici respectfully urge the Court to reverse the decision below on the question of whether a person's choice of language can be equated to the person's national origin.

II. Federal Rules Which Affect Core Rights of the States to Choose English for Internal Operations Must Be Explicit

The decision below will require the State to speak in a language which its political processes have decided will harm its interests.[17] This Court has historically recognized States' rights

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[17]89% of Alabama's voters approved the State's English
(continued...)

to "regulate the content of what is or is not expressed when it is the speaker." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 833 (1995). Though *Rosenberger* is a First Amendment case, it reflects this Court's concern for States' sovereignty.

A State defines itself as a sovereign "[t]hrough the structure of its government and the character of those who exercise government authority." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Several of these areas of State sovereignty lie beyond the general reach of federal laws, including the regulation of a State's internal operations. "A State is entitled to order the processes of its own governance." *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 2264 (1999)("Such plenary federal control of state government processes denigrates the separate sovereignty of the States.").

This is not a new thought, as this Court noted over a century ago: "To [the States] nearly the whole charge of interior regulations is committed or left." *Lane County v. Oregon*, 7 Wall. 71, 76 (1869); *Oregon v. Mitchell*, 400 U.S. 112, 126 (1970)(Black, J., joined by the Chief Justice and three other Justices)("And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty-fourth Amendments superfluous.").

Under this Court's recent decisions, the Tenth Amendment protects the reservation of "original powers" of a State. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 801 (1995); *Alden*, 119 S.Ct. at 2259, *quoting, Nevada v. Hall*, 440 U.S. 410, 425 (1979).

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[17](...continued)
Language Amendment in 1990. Secretary of State, *Certification of Results of Election Held June 5, 1990*, June 20, 1990, 1.

A State's Tenth Amendment right to choose the language of its own internal operations is one of those historically-based core powers. Throughout American history, this Court has permitted States to use English. *Patterson v. De La Ronde*, 8 Wall. 292, 299-300 (1869)(Court reconciled French and English versions of Louisiana mortgage law); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)("The power of the State to . . . make reasonable requirements for all schools, including a requirement that they shall give instructions in English, is not questioned."). And prior to the Constitutional Convention, the primacy of English was well-established. "[T]he English language dominated all public life. It was the only official language and as such was used in the courts, the assemblies, and the press." J.R. Pole, *Foundations of American Independence, 1763-1815*, 18 (1972).

Like the choice of location of its own State Capitol, a State's choice to use English in conducting its affairs is a "function essential to [the State's] separate and independent existence." *Coyle v. Wyoming*, 221 U.S. 559, 595 (1911). Choice of the English language for internal State operations is thus an "original power," a core State function over which federal abrogation power is limited. Any federal abrogation, therefore, must be explicit and remedial. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 638 (1999). There are few, if any, such abrogations, and those identified in the decision below are neither clear nor remedial.

The lower court seemed to rest its entire view of federal regulatory power over States' internal language choices on this Court's decision in *Lau v. Nichols*, 414 U.S. 563 (1974)(school district must provide some assistance to students who could not otherwise obtain an education). *See, e.g.*, 197 F.3d at 495-97, 504-07. Yet *Lau* was a narrow decision – focused specifically

on a particular problem in education – and not the type of clear, remedial abrogation envisioned by this Court's recent decisions. If left intact, the decision below will encourage other courts to use *Lau* to overrule States' internal decisions in other non-educational contexts, shoving that narrow, education-based decision far beyond its original limits.

This Court should protect these core States' rights by reversing the decision below.

CONCLUSION

Amici therefore respectfully urge the Court to reverse the decision below.

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November 9, 2000

APPENDIX

Appendix

Letter to Equal Employment Opportunity Commission

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6th District, Colorado

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Committee on Education and the Workforce
Subcommittees:
Early Childhood, Youth and Families
Oversight and Investigations

Committee on Resources
Subcommittee:
Energy and Minerals

Committee on International Relations
Subcommittees:
International Operations and Human Rights
Africa

Congress of the United States
House of Representatives
Washington, DC 20515-0606

December 14, 1999

The Hon. Ida L. Castro
Chairwoman
Equal Employment Opportunity Commission
1801 L St., N.W.
Washington, DC 20507

Dear Ms. Castro:

Thank you for the Commission's October 20, 1999 response to my August 11 inquiry about the Commission's activities regarding English-on-the-job rules and the Commission's guidelines under 29 C.F.R. section 1606.7.

While I appreciate the information you provided, I wanted to share with you that I am troubled by the Commission's activities. Your letter, for example, says: "under the EEOC's Guidelines, speak-English-only rules are presumed to have an adverse impact based on national origin, and therefore violate Title VII of the Civil Rights Act of 1964, as amended." My concern is that federal courts have repeatedly held just the opposite, and I see no evidence that the Commission's view has any legal basis.

I have a strong commitment to the principle of non-discrimination. I also have a strong commitment to the concept of a federal agency's power being limited by the Constitution and Congress's statutory delegation of authority to the agency.

As a member of the Oversight Subcommittee of the House Committee on Education and the Workforce, I must judge the Commission's interpretation of Title VII as applied to English-on-the-job rules under the law as described by the federal courts.

I have now reviewed this question thoroughly. Every final federal court decision on English-on-the-job rules has held that such rules do not violate Title VII or that the Commission's guidelines are *ultra vires*. To quote just one of the more than a dozen federal courts which have looked at this question: "An agency interpretation, like that in 29 C.F.R. s. 1606.7, **at variance with the statute it interprets**, must be outside the scope of the agency's interpretive authority, and must be **wrong**." *Kania v. Archdiocese of Philadelphia*, 14 F.Supp.2d 730, 735-736 (E.D. Penn. 1998) (emphases added).

This is a very strong denunciation of the Commission's view. A federal court, after substantial review of the evidence and the law, has judicially found that the Commission's Guidelines are "at variance with the statute it interprets," are "outside the scope of the agency's interpretive authority" (in other words, *ultra vires* -- beyond its power), and "wrong." Yet, unfortunately, the *Kania* court's position that the Commission's Guidelines are *ultra vires*, unfounded in Title VII and "wrong" is virtually unanimous among federal courts.

This is not a recent development which might have surprised the Commission. As you know, the Commission presented its draft Guidelines in briefings to the U.S. Court of Appeals for the Fifth Circuit in 1980; the Fifth Circuit rejected the Guidelines twice immediately thereafter. *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113

(1981)(English-on-the-job rule not illegal as applied to bilingual employee); *Vasquez v. McAllen Bay & Supply Co.*, 660 F.2d 686 (5th Cir. 1981)(same as applied to non-English-speaking employee).

Other cases finding either that English-on-the-job rules do not violate Title VII or that the Guidelines are *ultra vires* and unlawful include:

- *Long v. First Union Corp.*, 86 F.3d 1151 (4th Cir. 1996), *affirming* 894 F.Supp. 933 (E.D. Va, 1995). *See* 894 F.Supp. 940 (Guidelines are *ultra vires* because Congress enacted a specific and detailed framework for the burden of proof in disparate impact cases, and the Guidelines directly contradicted the plain terms of the statute it purports to interpret).

- *Gonzalez v. Salvation Army*, 985 F.2d 578 (11th Cir.), *cert. denied*, 508 U.S. 910 (1993), *affirming*, No. 89-1679-Civ-T-17 (M.D. Fla. 1990)(citing *Gloor* for proposition that, where co-workers or customers can overhear, English-on-the-job rule does not violate Title VII; notes that legitimate business purposes included the ability of managers to know what was said in the workplace, and the ability of co-workers to know what was being said around them).

- *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2726 (1994)(in rejecting language-based claim by employees who hurled racial insults at co-workers in language co-workers could not understand, Guidelines struck down as illegal and *ultra vires*). An attempt to obtain rehearing by citing Title VII

was rejected by the full Ninth Circuit. 13 F.3d 296 (9th Cir. 1994).

- *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987)(on motion for summary judgment, rejecting Guidelines-based claim by radio announcer for disparate impact).

- *Tran v. Standard Motor Products, Inc.*, 10 F.Supp. 2d 1199 (D.C. Kansas 1998)(in rejecting language-based claim by employee who sexually harassed co-workers in a language other than English, found that business necessity includes insuring that all workers can understand each other, preventing injuries, and preventing co-workers from feeling they are being talked about; English-on-the-job rule did not create hostile work environment).

- *Roman v. Cornell University*, 53 F.Supp. 2d 223, 237 (N.D. N.Y. 1999)(after surveying cases, finding: "All decisions of which this Court is aware have held that English-only rules are not discriminatory as applied to bilingual employees where there is a legitimate business justification for implementing such a rule" and "Several courts have held that an English-only policy designed to reduce intra-office tensions is a legitimate business reason.")

These decisions completely undermine the Commission's Guidelines. Surely the Commission should know of these decisions, yet they are not provided to employees or reflected in the Commission's policies.

Nor is there any countervailing controlling legal authority. There are only three decisions which might support the Commission's Guidelines – and none of those is significant or broadly applicable. The first was *Gutierrez v. Municipal Court of the Southeast Judicial District*, 838 F.2d 1031 (9th Cir. 1988), *vacated*, 490 U.S. 1016 (1989). In *Gutierrez*, court employees racially insulted co-workers in a language they could not understand; the Ninth Circuit upheld a title VII claim based on the Guidelines, suggesting that the employer's remedy was to fire African-American employees and hire Spanish-speaking supervisors. Several Ninth Circuit judges decried this opinion as a "let them eat cake" approach which would exacerbate workplace tensions. 861 F.2d 1187, 1194 (9th Cir. 1988). The Supreme Court of the United States not only vacated the *Gutierrez* opinion immediately without further briefing, but did so with an unusual reference to a passage indicating that the vacated opinion was to "spawn no legal consequences." 490 U.S. 1016 (1989).

It is unlikely that the Commission would want to rely on a vacated opinion which suggests firing African-American supervisors in order to permit continued racial insults in a workplace. Fortunately, the Commission's training and policy materials make no reference to *Gutierrez*.

The other decision is a recent rejection of a motion to dismiss. *EEOC v. Synchro-Start Products*, 29 F.Supp.2d 911 (N.D. Illinois, 1999). In *Synchro-Start*, Judge Shadur notes that he was "staking out a legal position that has not been espoused by any appellate court." 29 F.Supp. 2d at 915 n. 10. In addition, Judge Shadur also noted that he was only "crediting" the Guidelines at the very early stage of deciding a motion to dismiss. 29 F.Supp.2d at 912-13. Similarly, another decision

from the same District Court only two weeks before *Synchro-Start*, rejected an attempt to use the Guidelines to establish workplace hostility. *Gotfryd v. Book Covers, Inc.*, __ F.Supp. 2d ___ 1999 WL 20925, *8 (N.D. Ill. 1999).

The Commission probably will not want to rely heavily on a District Court opinion so specifically limited and contradicted in its own district. Unfortunately, the press coverage included in your letter to me indicates that personnel in the Chicago office do not share this discretion. An EEOC attorney is quoted as claiming that "courts are divided on the legality of such English-only personnel policies." This quote, which was given at the start of the lawsuit against Synchro-Start, is simply incorrect. At the time this quote was given, there were no courts which had rejected such policies, as Judge Shadur **later** recognized in his footnote in *Synchro-Start* saying that he was the first (though in all fairness, by now the Northern District of Illinois is divided on the validity of the Guidelines, as shown by *Synchro-Start* and *Gotfryd*).

The same article quotes another EEOC attorney as saying that English-on-the-job "policies are generally a manifestation of prejudice toward ethnic minorities." There is no such finding in the judicial cases, and it is difficult to believe that the EEOC attorney is applying some general factual finding rather than personal prejudice. I find no evidence that the Commission made such a general factual finding.

The most troubling note in the package of information, however, was the Chicago EEOC office's press release of January 21, 1999, in which John P. Rowe, District Director in Chicago, says that "One of our enforcement priorities in this jurisdiction is to make the Commission's Guidelines on 'English

only' rules a reality in the workplace. Judge Shadur's reference to the EEOC Guidelines and his decision permitting the case against Synchro-Start to keep moving ahead are very significant milestones and reinforce our commitment to the agency's enforcement priorities. We look forward to making further strides in this area."

It appears from this quote that the Chicago regional office has not reviewed or credited each of the more than a dozen federal judicial decisions rejecting the Commission's interpretation of Title VII as applied to English-on-the-job rules. It is difficult to determine what grounds the Chicago regional office has for believing that all those courts are wrong and the Commission interpretation is the only correct version.

There is a third (and most recent) decision, which is also contradicted in its own jurisdiction. As you know, the Commission sued Premier Operator Services of Desoto, Texas, alleging that its English-on-the-job rule violated Title VII. *EEOC v. Premier Operator Services*, __ F.Supp.2d ___, 1999 WL 1044180 (N.D.Texas, 1999). Magistrate Stickney refused to grant summary judgment in the case, finding that he must give "some consideration" to the Guidelines where there were genuine material factual disputes. Magistrate Stickney did not cite any decision involving English-on-the-job rules other than *Gloor*, which he said was not applicable to a situation where an employee "inadvertently" uses a language other than English. Yet an earlier decision by Judge Fitzwater in the same Northern District of Texas, citing *Gloor* and *Spun-Steak*, held flatly: "English-only policies are not of themselves indicative of national origin discrimination in violation of Title VII." *Magana v. Tarrant/Dallas Printing, Inc.*, __ F.Supp.2d __, 1998 WL 548686, *5 (N.D.Texas 1998).

The summary of all these cases is that there is no judicial recognition of a legal basis for the Commission's Guidelines from any federal appellate court, and the lower courts largely reject the Guidelines. This lack of legal foundation for a federal enforcement policy troubles me.

I have reviewed the material you sent to me explaining the Commission's position in general and instructing its personnel about English-on-the-job rules. I find no mention of most of these cases. I find no significant legal analysis of the Commission's interpretation beyond a simple declaration of its conclusions. I find interpretations which contradict and ignore the straightforward and unanimous opinions of the federal courts which have reviewed English-on-the-job rules. In short, the materials I received from the Commission explaining its position and instructing its personnel were simply "wrong." *Kania v. Archdiocese of Philadelphia*, 14 F.Supp.2d at 735-736.

That makes the case load report you sent to me all the more disturbing. According to your letter, in recent years, the Commission has carried an annual case load of between 120 and 150 charges against employers accused of violating Title VII by having an English-on-the-job rule. In the year ending August 26, 1999, the Commission "resolved a total of 121 charges on this issue." 49 of these charges were "resolved" by finding "no violation." Another 35 of these charges were "resolved" by closing prior to the end of an investigation. 27 employers were found to have "violations," apparently of Title VII, under the Commission's uniformly-rejected interpretation.

Because you did not provide me with sufficient data on these 27 "violations" of the Commission's interpretation, I

cannot tell where these employers are located, or whether the "violations" would survive a court test (for example, was the "violation" of Title VII based on the Commission's unlawful "presumption" that an English-on-the-job rule shifts the burden of proof onto an employer to justify the rule). This information is essential for me to determine the extent to which the Commission is abiding by the rules established by each of the Circuit Courts of Appeal which have rejected the Commission's interpretation.

You also listed seven lawsuits which had been filed, resolved or were pending during the year ending August 30, 1999. Three of these seven cases are in federal Circuits which have unequivocally rejected the Commission's interpretation of Title VII as applied to English-on-the-job rules.

In light of the above, please provide me with the following at your earliest opportunity:

1) a full and complete explanation of any legal rationale supporting the Commission's interpretation of Title VII as applied to English-on-the-job rules, including a) any materials relied upon by the Commission in adopting, reviewing and continuing in force 29 C.F.R. section 1606.7, and b) any materials used, reviewed or considered in any of the lawsuits referred to in your letter to me which provide any such legal rationale. I am particularly interested in reviewing the legal analyses in the materials the Commission provided the courts in *Synchro-Start* and *Premier Operator*.

2) A description of the geographic location of the described 27 employers found to be in "violation" of Title VII as interpreted by the Commission, preferably by location within

the circuits covered by each U.S. Court of Appeals. In addition, a description of whether the "violation" was considered to be of "adverse impact" or "treatment" under existing definitions. Also, a description of whether the "violation" was due to a presumption which was insufficiently rebutted by the employer, or whether the "violation" was proven by the investigation. You may remove all identifying information if required by statute, but the information I am requesting relates solely to actions taken by the Commission and its personnel, so redactions should be kept to a minimum.

3) A complete explanation of whether, and if so, how the Commission intends to revise its materials relating to English-on-the-job rules, including employee training and interpretation manuals, to reflect the current state of judicial decisions in this area.

While I will await the receipt of further information before making up my mind on further proceedings in this matter, I urge the Commission to review carefully its policies in this area. It is not in the national interest to extend federal power in this area any further than absolutely necessary. The Commission should recognize that when federal courts repeatedly say that it is acting illegally, serious reconsideration is warranted.

In addition, I urge the Commission to revisit this issue and its Guidelines at its earliest opportunity. If, in fact, regional office personnel are conducting their own policy pursuits, the Commission should exert control. If it is the Commission's own policy to "make the Commission's Guidelines on 'English only' rules a reality in the workplace," please let me know that as soon as possible.

Thank you for your attention to this matter.

Sincerely,

/s/
Tom Tancredo
Member of Congress

Response from Equal Employment Opportunity Commission to Cong. Tancredo

[seal]
U.S. Equal Employment Opportunity Commission
Washington, D.C. 20507

Jan 21 2000

The Honorable Thomas G. Tancredo
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Tancredo:

This is in response to your letter of December 14, 1999, regarding the policy of the Equal Employment Opportunity Commission (EEOC) on "English-only" rules. Specifically, you requested that the EEOC provide the following: 1) an explanation of the EEOC's legal rationale regarding the application of title VII to English-only rules; 2) information regarding the 27 charges challenging English-only rules during the period of August 28, 1998, to August 26, 1999, in which the EEOC found violations; and 3) an explanation of any changes the EEOC intends to make to materials addressing the English-only rule. This letter will address each of these requests in turn.

EEOC's Analysis of the Application of Title VII to English-only Rules[1]

As you know, the EEOC has adopted the following guidelines on English-only rules:

> § 1606.7 Speak-English-only rules
> (a) *When applied at all times.* A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it. [2]

[1]This section summarizes the EEOC's position on English-only rules. To provide a more detailed discussion of the EEOC's analysis, we have enclosed the initial and reply briefs filed by the EEOC as *amicus curiae* in support of rehearing en banc in *Garcia v. Spun Steak Co.*. Pursuant to your specific request, we have also enclosed the EEOC's response to defendant's motion to dismiss in *EEOC v. Synchro-Start Products, Inc.*, and the EEOC's opposition to defendants' motion for summary judgment in *EEOC v. Premier Operator Services, Inc.*, along with supporting materials.

> (b) *When applied only at certain times.* An employer may have a rule requiring that employees speak only in English at certain times where the employers can show that the rule is justified by business necessity.[2]

The guidelines reflect the EEOC's position that a rule requiring the use of English in the workplace can be reasonably presumed to have an adverse impact on the basis of national origin. As recognized by courts, an individual's primary language is closely tied to his or her national origin, which includes cultural and ethnic identity. The Supreme Court noted, "Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond." *Hernandez v. New York*, 500 U.S. 352, 370 (1991); *See also Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1487 (9th Cir. 1993)("It cannot be gainsaid that an individual's primary language can be an important link to this ethnic culture and identity.", *rehearing en banc denied*, 13 F.3d 296 (1993), *cert. denied*, 512 U.S. 1228 (1994); *Asian American Business Group v. City of Pomona*, 716 F.Supp. 1328, 1330 (C.D.Cal. 1989)("A person's primary language is an important part of and flows from his/her national origin."). Even for bilingual persons who become assimilated into American culture and learn to speak English fluently, their primary language remains closely tied to their national origin. *Gutierrez v. Municipal Court of the Southeast Judicial Dist.*, 838 F.2d 1031, 1039 (9th Cir. 1988), *remanded with directions to vacate as moot*, 490 U.S. 1016, *vacated as moot*, 873 F.2d 1342 (9th Cir. 1989); *see also Spun Steak, Spun Steak* [*sic*] 13 F.3d 296,

[2]The guidelines also require employers to provide employees with adequate notice of the rule. 29 C.F.R. § 1606.7(c).

298 (Reinhardt, J., dissenting from denial of rehearing en banc) (even for bilingual individual, "native language remains an important manifestation of his ethnic identity and a means of affirming links to his original culture").

An English-only rule creates an atmosphere of inferiority, isolation, and intimidation based on national origin for non-native English speakers, *regardless of whether they can comply with the rule*. *EEOC v. Synchro-Start Prods., Inc.*, 29 F.Supp. 911, 915 (N.D. Ill. 1999). They face discipline or discharge for failing to comply with the rule. They must struggle to find the right words in English to communicate, and worry about speaking in the "correct" language. These individuals are adversely affected by knowing that their behavior has been singled out as unacceptable, and that the employer has adopted a rule that specifically applies to them. As Judge Reinhardt stated, "English-only rules not only symbolize a rejection of the excluded language and the culture it embodies, but also a denial of that side of an individual's personality." *Spun Steak*, 13 F.3d at 298 (Reinhardt, dissenting from denial of rehearing en banc).

Because of the close connection between an individual's primary language and his or her national origin, an English-only rule has a disproportionate adverse impact on protected national [3] origin groups. *E.g.*, *Spun Steak*, 998 F.3d at 1486 (it is "beyond dispute" that any adverse effect of an English-only rule would be suffered disproportionately by Hispanics); *Synchro-Start*, 29 F.Supp. at 912 (English-only rule "unarguably impacts people of some national origins (those from non-English speaking countries) much more heavily than others").

The effect of an English-only rule is to single out individuals whose primary language is not English by denying

them a privilege that is granted to native English speakers. An English-only rule bars individuals whose primary language is not English from speaking in their native tongue – the language they are most comfortable with – at the workplace. Although speaking on the job is a privilege of employment, it may not be meted out in a discriminatory fashion. *See, Hishon v. King & Spaulding*, 467 U.S. 69, 75 (1984)("[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all"). Thus, because only native English speakers are permitted to speak in the language they are most comfortable with, an English-only rule has an adverse impact on bilingual employees whose primary language is not English.

Because of these effects on non-native English speakers, the guidelines reflect the EEOC's presumption that an English-only rule has a disparate impact based on national origin as explained above. *See Synchro-Start*, 29 F.Supp. 2d at 914 (EEOC has taken modest step of inferring that English-only rule disadvantages foreign national because of his or her national origin). Such a presumption avoids the need to litigate the issue "over and over again on a case by case basis." *Spun Steak*, 13 F.3d 300 (Reinhardt, J., dissenting from denial of rehearing en banc).

Nevertheless, the EEOC recognizes that there may be appropriate circumstances where an employer can require employees to speak English in the workplace. For example, if close communications is required for safety reasons, such as in the drilling of an oil well or working in a laboratory with dangerous substances, it may be necessary to require that communications among coworkers be in a language

understandable by all persons directly involved in the conversation. *See* Section 623: Speak-English-Only rules and Other Language Policies, EEOC Compliance Manual (BNA) 623:0009-0016 (1984). By requiring an employer to explain the business justification for an English-only rule, the guidelines balance a reasonable presumption of adverse impact with the employer's right to adopt needed business practices.

The guidelines have been scrutinized by relatively few courts since their adoption in 1980. Among U.S. Courts of Appeal, only one circuit, the Ninth Circuit, has directly addressed the guidelines.[3] In *Garcia v. Spun Steak Co.*, 998 f.2d 1480, 1486 (9th Cir.), *rehearing en banc* [4] *denied*, 13 F.3d 296 (1993), *cert. denied*, 512 U.S. 1228 (1994), the court stated that a plaintiff challenging an English-only rule would have to prove that a protected class is disproportionately

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[3]Three other U.S. Courts of Appeals have issued decisions on English-only rules but have not addressed the EEOC's guidelines. In *Long v. First Union Corp.*, 894 F.Supp. 933 (E.D.Va. 1995), the district court rejected the EEOC's guidelines, but the Fourth Circuit affirmed in an *unpublished* decision without addressing the guidelines. 86 F.3d 1151 (4th Cir. 1996)(per curiam). The Fifth Circuit decision in *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981), was issued prior to the adoption of the EEOC's guidelines. The court noted that it was considering the issue in the absence of any EEOC guidance. *Id.* at 268 n. 1. Finally, in *Gonzalez v. Salvation Army*, No. 89-1679-CIV-T-17, 1991 U.S.Dist. KEXIS 21692 (M.D. Fla. May 28, 1991), the district court found that the employer had established a legitimate business reason for applying an English-only rule to a bilingual individual, but did not address the EEOC's guidelines. The Eleventh Circuit summarily affirmed the district court in an unpublished, nonprecedential decision. 985 F.2d 578 (11th Cir.), *cert. denied*, 508 U.S. 910 (1993). For these reasons, none of these Courts of Appeals decisions can be interpreted as rejecting the EEOC guidelines.

disadvantaged by a policy that has a significant adverse effect on a term, condition, or privilege of employment. The court acknowledged that, if an English-only policy has any adverse effect on a term, condition, or privilege of employment, those effects would be disproportionately suffered by those of Hispanic origin. *Id.* The court also acknowledged, as did the employer, that such a policy might have an adverse effect on an individual who cannot speak English or whose English skills are very limited. *Id.* at 1487.[4] Accordingly, the court rejected the EEOC's guidelines on the grounds that they impermissibly presume that English-only policies have a disparate impact without requiring proof of such. *Id.* at 1490.

For the reasons explained above, the Commission disagrees with the decision in *Spun Steak*. In addition, we note that the majority in *Spun Steak* completely disregarded the reasoning in *Gutierrez v. Municipal Court of the Southeast Judicial Dist.*, 838 F.2d 1031 (9th Cir. 1988), *remanded with directions to vacate as moot*, 490 U.S. 1016 (1989), *vacated as moot*, 873 F.2d 1342 (9th Cir. 1989).[5] The court in *Gutierrez*

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[4]The court acknowledged that an English-only rule might have a disparate impact even on bilingual employees if enforced in a "draconian" manner, e.g., punishing an employee for a minor slip of the tongue, such as subconsciously substituting a Spanish word for an English word.

[5]The *Spun Steak* court merely stated that *Gutierrez* had no precedential value, and therefore, it was not bound by the reasoning in that decision. 998 F.2d at 1487 n. 1. Although *Gutierrez* was vacated and had no precedential value, it represented the views of the Ninth Circuit on English-only rules, and the validity of the case's reasoning was not affected because it was vacated on the grounds of mootness. *Spun Steak*, 13 F.3d at 301 (Reinhardt, J., dissenting from denial of

(continued...)

determined that the ease of compliance with an [5] English-only rule was of little or no relevance to the issue of whether an English-only rule has an adverse impact on minorities. *Id.* at 1041. Moreover, the court found that an English-only rule has a "direct effect on the general atmosphere and environment of the workplace." *Id.*

District courts that have considered the EEOC's guidelines have been divided. As you noted, some district courts have adopted the reasoning of the *Spun Steak* majority in rejecting the EEOC's guidelines.[6] Recently, however, the EEOC's guidelines have been upheld in two district court decisions in cases brought by the EEOC. In *EEOC v. Sunchro-Start Prods., Inc.*, 29 F.Supp. 2d 911, 914 (N.D. Ill. 1999), the court rejected the majority analysis in *Spun Steak*, and found the justification for the guidelines to be persuasive.[7] In *EEOC v. Premier Operator Services, Inc.*, No. 3:98-CV-198-BF, 1999 WL 1044180, at *6 (N.D. Tex. 1999), the court found that it was appropriate to defer to the EEOC's guidelines on English-

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[5](...continued)
rehearing en banc). Judge Reinhardt noted that the failure even to consider the reasoning of the unanimous decision in *Gutierrez* made it apparent that the only significant change was panel composition. *Id.*

[6]*E.g., Kania v. Archdiocese of Philadelphia*, 14 F.Supp. 2d 730 (E.D. Pa. 1998); *Long v. First Union Corp. of Va.*, 894 F.Supp. 933 (E.D. Va. 1995), *aff'd*, 86 F.2d 1151 (4th Cir. 1996)(*see* discussion of *Long* at note 3, above).

[7]In a decision issued two weeks earlier in the Northern District of Illinois, another district court judge rejected the plaintiff's reliance on the EEOC's guidelines, finding that they did not apply to the issue before it. However, the court did not address the validity of the guidelines. *Gotfryd v. Book Covers, Inc.*, No. 97 C 7696, 1999 WL 20925, at *8 (N.D. Ill. Jan. 7, 1999).

only rules, and that evidence in the record demonstrated that bilingual individuals are better able to communicate in their primary language. The court determined that it was not controlled by a prior decision of the Fifth Circuit, *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981), which upheld an English-only rule. The court in *Premier Operator* noted that the English-only rule at dispute in the case before it applied at all times, whereas *Gloor* specifically stated that it was only addressing a policy that did not apply during breaks, not one that applied at all times, and that it was issuing a decision in the absence of EEOC guidance.

In addition to the courts that have upheld the EEOC's guidelines, Congress implicitly approved the guidelines when it amended Title VII in 1991 to clarify the standard for proving disparate impact discrimination. During Senate discussions of the possible amendment of Title [6] VII through the Civil Rights Act of 1991, Senator DeConcini stated that several of his constituents had complained about English-only rules in the workplace. Senator DeConcini asked Senator Kennedy, one of the sponsors of the Civil Rights Act of 1991, whether the EEOC guidelines promulgated at 29 C.F.R. § 1606.7 relating to English-only rules would remain intact, and Senator Kennedy responded that the guidelines had worked effectively and that the new legislation would not affect them in any way. 137 Cong. Rec. 29,051 (1991). If Congress had viewed the guidelines as an unreasonable exercise of the EEOC's enforcement authority, it presumably would have altered them.

Finally, the Commission's guidelines have been supported by the Department of Justice. After the Ninth Circuit denied the request for en banc rehearing in *Spun Steak*, the Solicitor General filed a brief in support of the petition to the

Supreme Court to grant a writ of certiorari. The Solicitor General argued that the EEOC's guidelines reflect a "sound" interpretation of Title VII, and that the Ninth Circuit's decision is "wrong."[8]

The EEOC of course respects the rules of statutory interpretation set forth in courts decisions. With regard to English-only rules, however, only the Ninth Circuit has issued a controlling opinion on the validity of the guidelines, and the few district courts to have considered the question have been divided. In such circumstances, the EEOC, as the enforcement agency for the federal anti-discrimination laws, has a responsibility to continue to interpret the law and to promulgate and apply the analyses it thinks best reflect the language and spirit of Title VII. With the benefit of the EEOC's views on English-only rules, courts can make better-informed decisions when they confront this issue. As more jurisdictions issue decisions regarding English-only rules, the EEOC will continue to reassess its position as it does in other areas where the law is developing.

Summary of Charges

In our prior correspondence, we reported that between August 28, 1998, and Augst 26, 1999, 27 charges involving English-only rules were resolved after a cause finding had been issued. After further review of the charges, we determined that

[8]A copy of the brief supporting the petition for certiorari is enclosed.

3 of the 27 cases did not involve issues regarding English-only rules.[9]

Therefore, we are providing you with information on 24 charges. Those 24 charges were filed against 14 employers in the Third, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh [7] Circuits of the U.S. Court of Appeals. In 11 of the charges, violations were found under Title VII based, in part, on the presumption in the Commission's guidelines that an English-only policy has a disparate impact on protected national origin groups. Those charges were filed in the Third, Fourth, Fifth, Ninth, and Eleventh Circuits.

It should be noted that even for each of the above 11 charges, as instructed by Agency investigative procedures, the investigator performed an investigation to determine such matters as the scope of the English-only rule, to whom the rule applied, the manner in which the rule was applied, and the effect of the rule on the work environment. In addition, of the 11 charges, most challenged English-only rules that applied at all times in the workplace, in contrast to the less restrictive rule at dispute in *Spun Steak*, which did not apply during breaks or lunch periods.

EEOC offices in a jurisdiction that has issued a decision contrary to the guidelines continue to conduct the administrative process pursuant to the guidelines. Because the EEOC is charged with enforcing a federal law that has nationwide

[9]Two of the three cases challenged English-only policies, but cause findings were only issued on other issues raised in the charges. The third charge was miscoded in the computer as challenging an English-only policy.

application, the EEOC's policy is applied uniformly in all jurisdictions at the administrative level. Of course, the EEOC would not file a suit to enforce the guidelines if such suit has been precluded by governing circuit law.

The table below summarizes the 24 charges resolved between August 28, 1998, and August 26, 1999, after a violation was found because of an English-only rule:
[tabular material omitted] [8]

Revisions to Materials on English-only Rules

At this time, the EEOC does not believe that a change in its longstanding position on English-only rules would be appropriate. Accordingly, no changes in training materials or other EEOC documents will be made at this time. If the EEOC changes this view, it will propose appropriate changes to the guidelines, and revise internal materials to reflect any modified position.

We hope that this information is helpful in addressing the questions you have about the EEOC's policies on English-only rules. Please note that this letter does not constitute a written opinion or interpretation of the EEOC within the meaning of section 713(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-12(b)>

Sincerely,
/s/
William J. White, Jr.
Acting Director of Communications and Legislative Affairs

Enclosures [omitted]